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NOT FOR CITATION

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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7 || SEAN E. BRAZIL,

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Plaintiff,

No. C 05-1164 (PR)

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10 Correctional Officer G. A. RICE;
11 Correctional Officer T. CLEARY;
12 Sergeant P. J. FRUDDEN; Captain F.
13 G. AHL; Warden A. P. KANE; Appeals
Coordinator W. B. CHILDRESS; Director
of Corrections JEANNE S.
WOODFORD; and Senior Special Agent
MARK MIRVISS.

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Defendants.

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17 This is a civil rights case filed pro se by a state prisoner. In the initial review order
18 plaintiff's claims against defendant Rice were dismissed with leave to amend. His claims
19 against the other defendants were dismissed with prejudice. Plaintiff has amended.

20 In the complaint, plaintiff contended that Rice, a correctional officer, habitually failed
21 to pick up and deliver legal mail to inmates until the end of his shift. Plaintiff alleges that he
22 repeatedly complained to Rice about this, and threatened to sue him. On August 16, 2004,
23 Rice delivered incoming legal mail right at the end of his shift, and plaintiff refused it and
24 again threatened to sue Rice. Rice then allegedly threatened to have plaintiff moved.
25 Plaintiff “dared him to further violate [plaintiff’s] rights.” Plaintiff wrote up a grievance and
26 the next day showed it to Rice. Rice then left a Post-it asking that plaintiff be moved.
27 Plaintiff does not say why, but he was not moved.

28 In the initial review order, the court concluded that although plaintiff had not stated a

1 claim that Rice's actions were a violation of his right of access to the courts, he might be
2 able to state a claim that the threat and request to move plaintiff were retaliation for
3 plaintiff's exercise of his First Amendment free speech rights. However, plaintiff had not
4 alleged that Rice's actions had no legitimate penological purpose nor that facts showing
5 that he was harmed, see *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005)
6 (requirements for retaliation claim), so the claims against Rice were dismissed with leave to
7 amend.

8 The court noted in the initial review order that on the facts plaintiff had pleaded it
9 appeared that Rice had a legitimate penological objective, namely that of separating Rice
10 and plaintiff. In the amendment plaintiff attempted to meet this by contending that Rice
11 occasionally works in the area to which he might have been transferred, and that Rice
12 could always be assigned there at some point in the future. That is not enough. It is still
13 clear on the version in the amended complaint that there was a legitimate penological
14 objective for Rice's actions, namely to at least reduce, if not eliminate, contact between a
15 prisoner and a guard who were in conflict. That is, plaintiff has pleaded facts which show
16 he does not have a claim. See *Weisbuch v. County of Los Angeles*, 119 F.3d 778, 783 n.1
17 (9th Cir. 1997) (facts pleaded by plaintiff may show that he or she has failed to state a
18 claim; a plaintiff may plead herself out of court). Because plaintiff has amended once and
19 continues to allege facts showing that he does not have a claim, the dismissal will be
20 without further leave to amend.

21 CONCLUSION

22 The complaint is **DISMISSED** with prejudice for failure to state a claim. The clerk
23 shall close the file.

24 **IT IS SO ORDERED.**

25 Dated: May 24, 2006.



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PHYLLIS J. HAMILTON
United States District Judge